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No. 99-1486

In The

Supreme Court of the United States

SAC AND FOX NATION OF OKLAHOMA, et al.,

Petitioners,

v.

ANDREW CUOMO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT ABSENTEE SHAWNEE HOUSING AUTHORITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Three Tribes' properly invoked the federal question jurisdiction of the federal district court by presenting a claim that must be decided pursuant to state law?

2. Whether the assigned district judge abused her discretion by refusing to recuse hereself where no justification existed for the requested recusal?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD BE DENIED .. 4

I. THE WRIT MUST BE DENIED BECAUSE THE MATTER IN CONTROVERSY DOES NOT ARISE UNDER THE CONSTITUTION OR ANY LAW OR TREATY OF THE UNITED STATES 6

II. THE WRIT MUST BE DENIED BECAUSE THE THREE TRIBES HAVE FAILED TO ESTABLISH LACK OF IMPARTIALITY REQUIRING DISQUALIFICATION OF THE PRESIDING JUDGE 18

A. PLAINTIFFS' MOTION FOR DISQUALIFICATION WAS UNTIMELY AND CORRECTLY DENIED 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Abbott Lab. v. Gardner, 387 U.S. 136 (1967).....15, 16

Califano v. Sanders, 430 U.S. 99 (1977) 15

Citizen Band Potawatomi Indian Tribe v. Collier, 142 F.3d 1325 (10th Cir. 1998), *cert. denied sub nom Absentee Shawnee Tribe v. Citizen Band of Potawatomi Indian Tribe*, 525 U.S. 947 (1998) 11

Citizen Band Potawatomi v. Collier, Case No. CIV-92-2161-R (W.D. Okla. Oct. 30, 1992).....19, 20

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 10

Eastern Shoshone Tribe v. Northern Arapaho Tribe, 926 F. Supp. 1024 (D. Wyo. 1996) 12

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).....6, 8

Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)..... 17

Green v. Branson, 108 F.3d 1296 (10th Cir. 1997).....18, 21, 22

Green v. Dorrell, 969 F.2d 915 (10th Cir. 1992)..... 22

Gully v. First National Bank in Meridian, 299 U.S. 109 (1936) 8

Hagedorn v. Union Carbide Corp., 363 F. Supp. 1061 (N.D. Va. 1973)..... 8

Hinman v. Rogers, 831 F.2d 937 (10th Cir. 1987)..... 18

Ippolito-Lutz, Inc. v. Harris, 473 F. Supp. 255 (S.D. N.Y. 1979)..... 12

TABLE OF AUTHORITIES – Continued

Page

Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) 6

M.M. v. Zavaras, 139 F.3d 798 (10th Cir. 1998) 3

Mescalero Apache Tribe v. Martinez, 519 F.2d 479 (10th Cir. 1975) 8, 17

Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987) 6

National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) 9, 10

Navajo Tribal Utility Authority v. Arizona Dept. of Revenue, 608 F.2d 1228 (9th Cir. 1979) 16

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 17

Schmeling v. NORDAM, 97 F.3d 1336 (10th Cir. 1996) 6

Taylor v. Anderson, 234 U.S. 74 (1914) 8

United States v. Cooley, 1 F.3d 985 (10th Cir. 1993) 18, 19, 21

United States v. Kimball, 73 F.3d 269 (10th Cir. 1995) 21

United States ex rel. Gen. Rock & Sand Corp. v. Chuska Dev. Corp., 55 F.3d 1491 (10th Cir. 1995) 12

Western Shoshone Business Council for and on Behalf of Western Shoshone Tribe of Duck Valley Reservation v. Babbit, 1 F.3d 1052 (10th Cir. 1993) 7, 17

Willner v. University of Kansas, 848 F.2d 1023 (10th Cir. 1988) 21, 22

TABLE OF AUTHORITIES – Continued

Page

STATUTES

5 U.S.C. §§ 701-704 16

28 U.S.C. § 1653 9

28 U.S.C. § 455(a) 18, 21

28 U.S.C. § 1331 ..... 6, 7, 10, 16, 17

28 U.S.C. § 1362 ..... 6, 7, 16, 17

Okla. Stat. Ann. tit. 63, § 1054(f) 14

Okla. Stat. Ann. tit. 63 §§ 1051 et seq. 2, 4, 7, 8, 10

Okla. Stat. Ann. tit. 63 § 1057 ..... 2, 8

Fed. R. Civ. P. 8(a)(1) (1987) 6

REGULATIONS

24 C.F.R. § 1000.302 ..... 9, 15

24 C.F.R. § 1000.302(vi) 13

25 C.F.R. § 151.8 20

25 C.F.R. § 256.2 13

ATTORNEY GENERAL OPINION

Oklahoma Attorney General Opinion, No. 78-136 11

SUPREME COURT RULE

Sup. Ct. Rule 10 ..... 4, 5

RESPONDENT ABSENTEE SHAWNEE HOUSING AUTHORITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners, three Indian tribes and their respective housing authorities (hereinafter "Petitioners" or "Three Tribes"), are seeking review of a decision by the Tenth Circuit Court of Appeals affirming the dismissal of their complaint for lack of federal question jurisdiction and the denial of the motion to disqualify. In their effort to explain away the glaring deficiencies on the face of their initial and subsequently corrected complaint, Petitioners, now in their final appellate effort, attempt to extrapolate their supposed claim into one that they contend could possibly be construed as a federal question. Further, as a direct result of the adverse decisions made by the District Judge in this matter, Petitioners feebly attempt to show some bias and partiality that they believe that the Judge harbors against them. Petitioners fail in both efforts as there is no federal question jurisdictional basis for their complaint and the District Judge's decisions in this matter were legally grounded and exhibit no bias or partiality to either side of the controversy.

On May 13, 1997, Petitioners filed their complaint seeking declaratory and injunctive relief without stating and invoking a proper jurisdictional basis. Petitioners further requested a preliminary injunction, extraordinary relief, in order to mandate a change in the status quo and halt the lawful business of the Absentee Shawnee Housing Authority (hereinafter "ASHA"), an entity established

pursuant to the Oklahoma Housing Authorities Act, 63 O.S. §§ 1051 et seq.[1] ASHA filed a timely and proper Motion to Dismiss on June 4, 1997, based in part on lack of federal question jurisdiction. It is unequivocal that through these actions the Three Tribes sought to destroy the ASHA by effectively stealing and taking for their own the existing housing stock built and developed by the ASHA over the past 32 years and to deny the ASHA any

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[1] Specifically, 63 O.S. § 1057 states as follows:

> There is hereby created, with respect to each Indian tribe, band, or nation in the state, a public body corporate and politic, to function in the operating area of such Indian tribe, band, or nation to be known as the "housing authority" of said Indian tribe, band, or nation, which shall be an agency of the State of Oklahoma, possessing all powers, rights, and functions herein specified for city and county housing authorities created pursuant to this act: Provided that said Indian housing authority shall not transact any business nor exercise its powers hereunder until or unless the governing council of said tribe, band, or nation, as the case may be, by proper resolution, declares that there is a need for an authority to function for said tribe, band, or nation.
>
> Except as otherwise provided in this act, all the provisions of law applicable to housing authorities created for cities and counties and the commissioners of such authorities shall be applicable to Indian housing authorities and the commissioners thereof, unless a different meaning clearly appears from the context. The Chief or other governing head of an Indian tribe, band, or nation is hereby authorized to exercise all appointing and other powers with respect to an Indian housing authority that are vested by this act in the mayor of a city relating to a city housing authority.

area of future operation. The Three Tribes wholly failed to demonstrate a proper legal or jurisdictional basis for this extraordinary request and the requested injunctive relief was properly denied by the District Court on July 7, 1997. Doc No. 33. All further proceedings in this matter were stayed by the District Court until the resolution of ASHA's pending Motion to Dismiss.

Over one hundred days later, on August 22, 1997, in an obvious response to adverse rulings and in an attempt to "judge shop", the Three Tribes sought the recusal of the presiding Judge, [Doc 39] and subsequently sought an appeal on the denial of the request for a preliminary injunction. [Doc 41] The Three Tribes also requested an expedited appeal and an injunction pending appeal. The presiding Judge overruled the Three Tribes' Request for Disqualification, Petitioners' App. 19, and the Tenth Circuit Court of Appeals rejected the Three Tribes' request to expedite the appeal and for an injunction pending an appeal. Petitioners' App. 6.

On March 24, 1998, the District Court properly dismissed the Three Tribes' complaint[2] for "lack of federal question jurisdiction or, in the alternative, for failure to join an indispensable party, the Absentee Shawnee Tribe of Oklahoma." Petitioners' App. 21. After attempting to obtain a second order of dismissal from the District Court, the Three Tribes' appealed the dismissal Order to the Tenth Circuit Court of Appeals. The Tenth Circuit

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[2] Although the District Court stated the dismissal in terms of the "Complaint" it is patently clear that the Court intended a dismissal of all claims and/or actions. *M.M. v. Zavaras*, 139 F.3d 798 (10th Cir. 1998).

Court of Appeals affirmed the dismissal and the denial of the motion to disqualify.

The Three Tribes, without jurisdictional authority, seek to dramatically alter the status quo that has been in place and approved by the Department of Housing and Urban Development (hereinafter "HUD") for more than 32 years and to somehow convince this honorable Court, without proper statutory or other authority, that such an unprecedented action is warranted and equitable. In response, the ASHA, an entity created pursuant to state statute, i.e., 63 O.S. §§ 1051 et seq., asserts that such actions cannot be sanctioned by this Court because (1) federal court subject matter jurisdiction is entirely lacking from an examination of the face of the Three Tribes' Complaint and same has been successfully challenged by the ASHA; (2) the ASHA is an entity created by state statute and any question regarding its existence and/or operations would arise under state, not federal, law; and (3) the Three Tribes have totally failed to identify any bias or partiality of the presiding District Judge. Therefore, the Three Tribes' Petition for Writ of Certiorari must be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

A petition for writ of certiorari is granted only for "compelling reasons."[3] Because the Three Tribes have not

[3] Sup. Ct. Rule 10 states as follows:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. *A petition for a writ of certiorari will be granted*

articulated any compelling reason for granting certiorari, the petition should be denied. In the first instance, the lack of federal question jurisdiction is apparent from the face of their complaint. Secondly, the Three Tribes have failed to establish lack of impartiality requiring disqualification of the presiding District Judge. These arguments will be discussed in order.

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only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

I. THE WRIT MUST BE DENIED BECAUSE THE MATTER IN CONTROVERSY DOES NOT ARISE UNDER THE CONSTITUTION OR ANY LAW OR TREATY OF THE UNITED STATES

In order for a federal court to exercise subject matter jurisdiction over a claim, the plaintiff's complaint must contain a plain statement of the basis for jurisdiction. Fed. R. Civ. P. 8(a)(1) (1987). In the Complaint, Petitioners contend that jurisdiction is proper under 28 U.S.C. §§ 1331 and 1362, without pleading a factual basis for federal question jurisdiction. 28 U.S.C. § 1331 states as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

In deciding whether this or any other case arises under federal law, federal courts are guided generally by the "well-pleaded complaint" rule, under which a suit arises under federal law "only when the plaintiff's statement of his own cause of action shows that it is based" on federal law. *Schmeling v. NORDAM*, 97 F.3d 1336 (10th Cir. 1996) *citing Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). *See also Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63 (1987) ("It is long settled law that a cause of action arises under federal law only when the Plaintiff's well-pleaded complaint raises issues of federal law.") For purposes of § 1331, it has been determined by this honorable Court that a case "arises under" federal law only when "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v.*

Construction Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983). To bring a case within the purview of the requirements of § 1331, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Western Shoshone Business Council for and on Behalf of Western Shoshone Tribe of Duck Valley Reservation v. Babbit*, 1 F.3d 1052, 1058 (10th Cir. 1993).

In the present case, the complaint and its "correction" relied upon by the Three Tribes merely cite the federal question statutes, 28 U.S.C. §§ 1331 and 1362, and makes no legitimate attempt to demonstrate that the controversy arises under the Constitution, laws or treaties of the United States. Therefore, the Three Tribes fail to satisfy the elementary requirements of the "well-pleaded complaint" rule.[4]

On the face of the complaint, the Three Tribes allege that the ASHA is operating outside of its operational/jurisdictional area as defined by state law and within the operational/jurisdictional area of the Three Tribes. The law at issue in the complaint, if any, is the Oklahoma Housing Authorities Act, 63 O.S. §§ 1051 et seq. – the law that "determines the operational/jurisdictional area of an Indian housing authority created under Oklahoma law."

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[4] The questions presented by the Three Tribes in their Petition for Writ of Certiorari indicate their displeasure in being unable to obtain a hearing on their original complaint. However, the complaint must first properly invoke federal jurisdiction before any hearing becomes a possibility.

Petitioners' App. at 44, ¶ 15.[5] The Three Tribes fail to plead any constitutional provision, federal law or treaty upon which federal question jurisdiction could rest. A close analysis of the face of the complaint[6] reveals that the only law in question is 63 O.S. §§ 1051 et seq. – an Oklahoma state law that requires no federal court interpretation for enforcement. In fact, there is no hint of any federal question contained in the Plaintiffs' Complaint to substantiate subject matter jurisdiction.[7]

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[5] Plaintiffs further acknowledge the controlling Oklahoma law in ¶ 10 of the Complaint stating as follows: "The Housing Authority of the Absentee Shawnee Tribe (hereinafter "ASHA") was created pursuant to the Oklahoma Housing Act (63 O.S. § 1057) and is also located in the Western District . . . " See Petitioners' App. 43, ¶ 10.

[6] "In deciding whether the matter in controversy involves [a federal question], only the complaint should be examined, and indeed, only those parts of the complaint directly and necessarily relating to the plaintiff's cause of action should be considered." *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479 (10th Cir. 1975). See also *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936) and *Taylor v. Anderson*, 234 U.S. 74 (1914). Petitioners' repeated attempts to belatedly explain what was meant by the deficient allegations in the Complaint are insufficient to invoke federal question jurisdiction. It is the face of the complaint that must be examined by the Court and that must adhere to the "well-pleaded complaint" rule.

[7] A conclusory statement such as that contained in the "Corrections to Complaint" document announcing jurisdiction is insufficient to invoke the jurisdiction of the federal court. See *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061 (N.D. W. Va. 1973) (rule governing pleading of jurisdiction in federal court requires more than simply alleging that jurisdiction exists, or citing federal statute; complaint should set out clearly facts necessary to support jurisdiction). See also, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-12 (1983)

When queried by the Tenth Circuit Panel at oral argument concerning the basis for federal question jurisdiction, counsel for the Three Tribes stated the basis as 24 C.F.R. § 1000.302[8] – a regulation promulgated by HUD and effective on *March 12, 1998* – almost a full year *after* the filing of the Three Tribes' complaint. Even though the Three Tribes could have amended the deficient complaint, even on appeal, 28 U.S.C. § 1653, no amendment was ever sought by the Three Tribes, and as the Tenth Circuit correctly noted, "[e]ven after a motion to dismiss had been filed in district court, specifically alleging that plaintiffs failed to plead the existence of a federal question, plaintiffs relied upon vague general statements about federal funding by HUD . . . It was not until after the district court dismissed their complaint that plaintiffs finally decided what they needed to argue to avoid such dismissal . . . ". Petitioner's App. 10 and 11.

Interestingly, the Three Tribes now contend that they are not required to state a specific statute in order to avoid dismissal for lack of federal question jurisdiction because they claim, for the first time, that their cause of action arises under federal common law. For this inconsistent and untenable position the Three Tribes cite *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). A careful reading of *National Farmers* does

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(under the "well-pleaded complaint rule, federal jurisdiction exists only when the plaintiff's complaint raises issue of federal law).

[8] Belated citation to this regulation was first noted in Appellants' Tenth Circuit Brief at footnote 31. See Petitioners' App. at 10.

not indicate that the Court eliminated the requirement of stating the basis of federal question jurisdiction. In fact, the Court emphasized the need of articulating such a claim.

> Thus, in order to invoke a federal district court's jurisdiction under 1331, it was not essential that the petitioners base their claim on a federal statute or a provision of the Constitution. *It was, however, necessary to assert a claim "arising under" federal law.*

National Farmers at 850. The Three Tribes have not contended, until now, that the basis of jurisdiction for their claim was federal common law and neither is such an acceptable position. Notwithstanding that the Three Tribes have belatedly asserted a supposed statutory basis for their claim, federal common law has traditionally arisen in the limited context of aboriginal property rights[9] and is not applicable where, such as here, the plaintiffs' claim to relief is dependent upon statute.

The ASHA was created by and continues to operate under state law pursuant to the Oklahoma Housing Authorities Act, 63 O.S. §§ 1051 et seq. The Plaintiffs attempt to confuse the matter by asserting that the ASHA, a state created entity, should be characterized the same as the Absentee Shawnee Tribe of Oklahoma, a federally recognized Indian tribe. To support this bizarre

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[9] "[In *Oneida I*], [w]e noted that the Indians' right of occupancy need not be based on treaty, statute, or other formal Government action. We stated that "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

posture, the Three Tribes rely on a prior decision of the District Court for the Western District of Oklahoma which was ultimately appealed to the Tenth Circuit Court of Appeals and this court, *Citizen Band Potawatomi Indian Tribe v. Collier*, 142 F.3d 1325 (10th Cir. 1998), *cert. denied sub nom. Absentee Shawnee Tribe v. Citizen Band of Potawatomi Indian Tribe*, 525 U.S. 947 (1998). The Three Tribes' reliance on *Collier*, supra, is misplaced. The issues ultimately decided in *Collier* surround the ability of the Secretary of the Interior to place land into trust for the benefit of the Absentee Shawnee Tribe without the consent of the Citizen Potawatomi Nation – an activity and issues totally unrelated to the activities of a state entity such as the ASHA. Under any circumstances, this case is totally irrelevant to the issues surrounding the instant matter.[10]

The Three Tribes contention, at its base, is that the ASHA is conducting operations outside of its "area of operation". Oklahoma law does not expressly state the boundaries for an Indian Housing Authority. However, it is clear that the resolution to the problem does not involve a federal question. See *Oklahoma Attorney General Opinion*, No. 78-136 ("An overview of 63 O.S. 1971, sec. 1061 and other related statutes shows that the Oklahoma Legislature failed to define with specificity what the 'area of operation' of an Indian Housing Authority was to include. Consequently, resolution of this issue must await

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[10] The Three Tribes' admit that the *Collier* case involved a "dispute with the Absentee Shawnee [Tribe] over territorial jurisdiction", Petitioner's Brief at 11, note 15, and that this is a case involving a dispute with the Absentee Shawnee Housing Authority – a separate and distinct entity. See Appellants' Tenth Circuit Brief at 16.

for legislative definition through its capacity to promulgate laws and amendments or be resolved on a case by case basis by a court of law.") As clearly stated by the foregoing opinion, the question of the "area of operation" of the ASHA is one of state law and therefore not cognizable in a federal forum.

It is indisputable that the ASHA receives funding from the Department of Housing and Urban Development. However, contrary to the Three Tribes' position, the Three Tribes' claim does not depend upon the construction of the federal statute which authorizes this funding. It is based entirely on the "area of operation" as defined by Oklahoma law. The fact the ASHA enters into contracts with HUD does not implicate federal law. The Annual Contribution Contracts between the ASHA and HUD do not make the definition of "operating area" a federal question. *See, Ippolito-Lutz, Inc. v. Harris,* 473 F. Supp. 255, 259 (S.D. N.Y. 1979) (when "federal law does not expressly create the remedy sought by plaintiff and because the determination of plaintiff's right to relief requires neither the construction and interpretation of the Act nor the application of federal principles in order to vindicate a distinctive policy of the Act" the controversy does not arise under federal law). Further, as the Tenth Circuit correctly pointed out, " . . . the fact that federal funds are involved is, by itself, insufficient to establish the existence of a federal question. *See, Eastern Shoshone Tribe v. Northern Arapaho Tribe,* 926 F. Supp. 1024, 1031 (D. Wyo. 1996); *see also United States ex rel. Gen. Rock & Sand Corp. v. Chuska Dev. Corp.,* 55 F.3d 1491 (10th Cir. 1995)." Petitioner's App. at 10-11. The relief sought by the Appellants would require the federal court to interpret and

define state statutory law, an area which is clearly outside the realm of authority of the federal court.

In the Three Tribes' Opening Brief before the Tenth Circuit, the Three Tribes admit that the "ASHA is a state agency established pursuant to Oklahoma law and is a legal entity separate and apart from the tribe", Appellants' Tenth Circuit Brief at 16, yet incredibly now before this honorable court, the Three Tribes make a blatant attempt to mislead the court by misstating information concerning "service areas"[11] and citing BIA regulations – not HUD regulations – to support the untenable argument that the ASHA's jurisdictional boundaries are coextensive with the jurisdictional authority of the Absentee Shawnee Tribe.[12]

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[11] The Three Tribes incorrectly cite 24 C.F.R. § 1000.302(vi) as the definition of a service area. Section 1000.302(vi) provides the definition of *formula* area – a geographical area that HUD uses to determine funding. Contrary to the Three Tribes' assertion, this regulation does not address or attempt to define "service area" of a state created Indian housing authority.

[12] The Three Tribes incorrectly state, without cited authority, "*Under HUD regulations*, the area of operation in Oklahoma for federal Indian housing programs is a tribe's trust lands and former reservation area. (Emphasis added.) Incredibly, the Three Tribes cite Department of Interior promulgated regulations regarding a Bureau of Indian Affairs program – not Department of Housing and Urban Development regulations which are applicable to this housing program of HUD. 25 C.F.R. § 256.2 is a regulation promulgated by the Department of Interior, Bureau of Indian Affairs ("BIA") with regard to the Housing Improvement Program. This is a program funded by the BIA and administered by the Absentee Shawnee Tribe. This program clearly has no connection to the ASHA. It would appear that the Three Tribes wish to misrepresent the law

Perhaps the most glaring and obvious error cited by the Three Tribes is 63 O.S. § 1054(f) for the definition of " 'area of operation' for an Indian housing authority created under state law." Petition for Writ of Certiorari at 4, fn. 6. Contrary to the Three Tribes' statement, noticeably *absent* from the definitions provided in 63 O.S. § 1054 is any mention of Indian housing authorities. 63 O.S. § 1054(f) defines "area of operation" as follows:

> (f) "Area of Operation" means:
>
> > (1) in the case of an authority of a city, the city and the area within one (1) mile of the territorial boundaries thereof, except that the area of operation of an authority of any city shall not include any area which lies within the territorial boundaries of some other city;
> >
> > (2) in the case of an authority of a county, all of the county for which it is created: Provided, that a county authority shall not undertake any project within the boundaries of any city unless a resolution shall have been adopted by the governing body of the city and by any authority which shall have been theretofore established and authorized to exercise its powers in the city declaring that there is need for the county authority to exercise its powers within that city. No authority shall operate in any area in which an authority already established is operating without the consent by resolution of the authority already operating therein.

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and misstate the facts in order to support their attempt to create federal jurisdiction where none exists.

Further, the Three Tribes misstate the impact of the formula area defined in the regulations for the Native American Housing Assistance and Self-Determination Act (hereafter "NAHASDA"), 24 C.F.R. § 1000.302. NAHASDA allows for flexible formula areas with consideration being given to the Census determinations and HUD's own consideration of previous and planned investment in the given area. *Id.* The consent requirement discussed by the Three Tribes in the Petition for Writ of Certiorari at page 5, fn. 7, and cited to the 1978 Oklahoma Attorney General's opinion, refers to state created Indian housing authorities. None of the Three Tribes have housing authorities that are state created; therefore this discussion is totally inapplicable to this controversy.

Moreover, the Three Tribes mistakenly rely on *Califano v. Sanders*, 430 U.S. 99 (1977) and *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967) for the proposition that "federal courts have jurisdiction to review agency action." Petition for Writ of Certiorari at 19, fn. 24 and at 16. The issue in *Califano* was whether § 10 of the Administrative Procedures Act ("APA") afforded a basis for federal judicial review of agency actions and if not, whether the Social Security Act provided this basis. The Court concluded that neither § 10 of the APA nor the cited section of the Social Security Act provided a basis for federal judicial review in this case. The holding in *Califano* does not dispense with the necessity of a well-pleaded complaint, exhaustion of administrative remedies, the need to demonstrate an independent federal question, or the necessity of a waiver of the United States' sovereign immunity.

Abbott, supra, questions whether, under the Administrative Procedure Act, 5 U.S.C. §§ 701-704, Congress intended to forbid pre-enforcement review of regulations promulgated by the Commissioner of Food and Drugs pursuant to the Federal Food, Drug, and Cosmetic Act. As the Tenth Circuit noted, the Three Tribes' complaint never mentioned or eluded to the Administrative Procedure Act and in fact, when questioned directly at oral argument as to whether he could have brought the action under the Administrative Procedure Act, counsel for the Three Tribes specifically stated that "he did not believe he could." Petitioners' App. at 9. Therefore, it appears "problematic" that the Three Tribes now assert errors were made by the Court and cite the Administrative Procedure Act as authority. The Three Tribes totally fail to invoke federal jurisdiction pursuant to 28 U.S.C. § 1331 for their claim.

The Three Tribes also rely on 28 U.S.C. § 1362 as a basis for this court's jurisdiction. 28 U.S.C. § 1362 specifically grants district courts jurisdiction in federal question cases brought by Indian tribes.[13] Section 1362 states as follows:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian

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[13] Of the six (6) plaintiffs in this matter, only three (3) are federally recognized Indian tribes. The other three (3) plaintiffs are tribal housing authorities and these plaintiffs would be unable to invoke jurisdiction under § 1362 as they are not defined as Indian tribes for these purposes. *See, Navajo Tribal Utility Authority v. Arizona Dept. of Revenue*, 608 F.2d 1228 (9th Cir. 1979).

> tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

In order for jurisdiction to attach under § 1362, the matter in controversy must arise under the Constitution, laws, or treaties of the United States, identical to the prerequisites under § 1331. *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479 (10th Cir. 1975). The purpose of § 1362 was to remove certain jurisdictional impediments for Indian tribes. See *Western Shoshone Business Council For and on Behalf of Western Shoshone Tribe of Duck Valley Reservation v. Babbitt*, 1 F.3d 1052, 1058 (10th Cir. 1995). Section 1362 did not, however, eliminate the federal question requirement and underpinning for a federal cause of action. *Id.* See *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 482 (10th Cir. 1975) ("In our view sec. 1362 does not dispense with the requirement of pleading a federal question."); *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714-15 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) (Congress used "arising under" language in section 1362 that is identical to that contained in section 1331.); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (declining to find § 1362 broader than § 1331). The Three Tribes have failed to invoke federal jurisdiction under § 1331 and thereby fail under § 1362 as well. The Tenth Circuit Court of Appeals correctly affirmed the District Court's dismissal of this matter; therefore, no compelling reason exists to grant the writ of certiorari. The writ must be denied.

II. THE WRIT MUST BE DENIED BECAUSE THE THREE TRIBES HAVE FAILED TO ESTABLISH LACK OF IMPARTIALITY REQUIRING DISQUALIFICATION OF THE PRESIDING JUDGE

The Three Tribes' Motion for Disqualification was based on the alleged personal bias and prejudice of the Judge and brought pursuant to 28 U.S.C. § 455(a). That section provides as follows:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

In applying this section, the objective test announced by the Tenth Circuit is "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993) and *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997). The initial inquiry is "whether a reasonable *factual* basis exists for calling the judge's impartiality into question." *Cooley* at 993. "The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom." *Id.* "A judge should not recuse h[er]self on unsupported, irrational, or highly tenuous speculation." *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). Courts have identified several factors which will not ordinarily satisfy the requirements for disqualification under § 455(a). These factors include:

> (1) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters;
>
> * * *

(3) prior rulings in the proceeding, or another proceeding, solely because they were adverse;

(4) mere familiarity with the defendant(s), or the type of charge, or kind of defense presented; . . .

Cooley at 993-94 (citations omitted).

The Three Tribes' Motion for Disqualification offered baseless innuendo and empty allegations of prejudice in support of its effort to disqualify the presiding judge. The Three Tribes complained that because the presiding judge previously served as the U.S. Attorney during the litigation of *Citizen Band Potawatomi v. Collier*, Case No. CIV-92-2161-R (W.D. Okla. Oct. 30, 1992), her impartiality must be called into question. The Three Tribes allege that the U.S. Attorney argued a position "virtually identical to that taken here by her successor, to wit: defending the expansive jurisdictional claims of the Absentee Shawnee." For the Three Tribes, this argument hinges on whether the *Collier* case and this case involve "essentially the same parties and issues which created an 'appearance of partiality' mandating disclosure and probably recusal." Petition for Writ of Certiorari at 21. The Three Tribes strain to analogize the issues herein with those involved in *Collier* in order to question the presiding judge's motives.

As a matter of record, the instant case and the *Collier* case are totally unrelated except for the fact that the Citizen Potawatomi Nation is a common Plaintiff in both matters and counsel for the Citizen Potawatomi Nation has appeared in both matters. The issues in the two cases involve different defendants and are totally dissimilar.

Collier questioned whether the Citizen Potawatomi Nation and the Absentee Shawnee Tribe share a common reservation area and whether 25 C.F.R. § 151.8 contains a requirement that the Secretary of the Interior obtain the consent of the Citizen Potawatomi Nation before placing land into trust on behalf of the Absentee Shawnee Tribe. The issues in the instant matter surround the area of operation of a state-created entity, i.e. the Absentee Shawnee Housing Authority, and whether Indian tribes and tribally created housing authorities can dictate the activities of a state-created entity. The Three Tribes' disingenuous extrapolation of the issues could not and does not in fact create any prejudice or bias on the part of the presiding judge.

Perhaps the most obvious difference between *Collier* and this case is the fact that the federal defendants in *Collier* did not appeal the final District Court's decision to the Tenth Circuit as the U.S. Attorney has done in this matter. These contradictory actions could hardly be seen as "a position virtually identical to that taken here by her successor" or as federal defense of the ASHA or the Absentee Shawnee Tribe in general.

The mere fact that the presiding judge held the position of U.S. Attorney prior to taking the bench is not in itself sufficient to require disqualification as the Three Tribes assert. The Three Tribes do not assert that the presiding judge "participated as counsel" in the *Collier* litigation, but rather that the judge had a "facially adverse interest" that prevented her from being impartial. This characterization of the judge as an individual who would use the powers of the federal court to effect

revenge on any party who has been successful in litigation against the United States is pure speculation and opinion and is not supported by any factual basis. Baseless allegations are insufficient to require disqualification of the presiding judge. *See United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993); *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997); *Willner v. University of Kansas*, 848 F.2d 1023, 1027 (10th Cir. 1988).

A. PLAINTIFFS' MOTION FOR DISQUALIFICATION WAS UNTIMELY AND CORRECTLY DENIED

"The party seeking recusal under § 455 . . . must do so in a timely fashion." *United States v. Kimball*, 73 F.3d 269, 273 (10th Cir. 1995) and *Willner v. University of Kansas*, 848 F.2d 1023 (10th Cir. 1988). The Three Tribes filed their Complaint in the instant matter on May 13, 1997. The case was immediately assigned to the presiding judge.

The Three Tribes' counsel of record in this matter was counsel of record for the Citizen Potawatomi Nation in the *Collier* case. Therefore, counsel was aware from the date of filing this complaint that the presiding judge had previously been the United States Attorney and that she had held such office during the litigation of the *Collier* case. This fact was not "uncovered" by any review of her background needlessly conducted by counsel. See Petition for Writ of Certiorari at 20.

The Three Tribes were aware of the presiding judge's previous association with the U.S. Attorney's office at the time the Complaint was filed. Yet the Three Tribes made

no motion for disqualification until such time as the Judge had ruled against their inadequate request for a Preliminary Injunction – more than three months after the filing of the Complaint. Adverse rulings cannot form the appropriate basis for disqualification. *Green v. Dorrell*, 969 F.2d 915, 919 (10th Cir. 1992).

Further, though the Three Tribes' now attempt some contrived explanation of their delayed actions, the Three Tribes' Motion was devoid of any explanation for the extended delay in seeking disqualification. In *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997), an unexplained one month delay was held to be untimely and thereby insufficient for disqualification. "Granting a motion to recuse many months after an action has been filed wastes judicial resources and encourages manipulation of the judicial process." *Willner* at 1029. Plaintiffs' unexplained delay in requesting disqualification and in obvious response to an adverse ruling is not sufficient to mandate disqualification of the presiding judge in this matter.

CONCLUSION

On May 13, 1997, the Three Tribes' filed a defective and insufficient complaint. Since that time, instead of attempting to amend the complaint in an effort to properly cure the defects, if possible, the Three Tribes' have urged the court to overlook those deficiencies and proposed to explain away, by whatever means available, the glaring inadequacies of the document. When the District Judge refused to look the other way but instead ruled

against the Three Tribes' requested relief, the Three Tribes' decided that the judge must recuse herself. The Three Tribes are unable to present any credible evidence in support of their belated Motion for Disqualification. Ergo, no compelling reason has been presented for this court to grant the Writ of Certiorari and such request must be denied.

Respectfully submitted,

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